THE INSTITUTION OF ATHENIAN ARBITRATORS

By Robert J. Bonner

Written evidence is inferior to the testimony of witnesses liable to cross-examination. No satisfactory explanation of the reason for the change from oral to written evidence has ever been advanced.[1] The plaintiff in *Apollodorus* v. *Stephanus*, a perjury case, remarks that the law required written evidence: *ἵνα μήτ' ἀφελεῖν ἐξῇ μήτε προσθεῖναι τοῖς γεγραμμένοις μηδέν*.[2] This statement does not necessarily mean that the sole purpose of the provision was to facilitate the punishment of perjury, for the practice was never extended to the *Blutgerichte*, where the consequences of perjury were likely to be more serious than in the other courts.[3] In modern practice evidence is reduced to writing mainly for purposes of appeal. In Athens also appeals were based almost entirely on the affidavits presented at the arbitration.[4] It seems quite plausible, therefore, to suppose that the real motive for requiring affidavits was to insure that the appeal should be taken substantially on the evidence as originally presented. Written evidence is fundamental in arbitration proceedings as described by Aristotle.[5] Consequently the law instituting arbitration was either first enacted or radically revised when written evidence was introduced.[6]

[1] Both arbitration and perjury had occurred to me as probable reasons (*Evidence in Athenian Courts* [1905], p. 47). Leisi, *Der Zeuge im Attischen Recht* (1908), p. 87, does not suggest any special reason for the innovation but thinks it was introducted by litigants: "Allmählich mochte es sich für die Parteien als praktisch erweisen, den Worlaut der Zeugnisse schriftlich zu fixieren, um das Plädoyer ganz genau auf sie einrichten zu können und vor nachteiligen Auszerungen besser geschützt zu sein . . . . ob zuerst noch beide Modalitäten nebeneinander bestanden, oder ob das schriftliche Verfahren sogleich gesetzlich vorgeschrieben wurde, ist nicht zu entscheiden."

[2] Demosthenes xlv. 44.

[3] Bonner, "Evidence in the Areopagus," *Class. Phil.*, VII (1912), 450; cf. Lipsius, *Das attische Recht* (1915), p. 883.

[4] For exceptions see *Evidence in Athenian Courts*, p. 55.

[5] *Const. of Athens* 53.

[6] Leisi, *op. cit.*, pp. 85 ff.; Lipsius, *op. cit.*, p. 883; "Evidence in the Areopagus," *Class. Phil.*, VII (1912), 450, n.1.

According to the older view, public arbitration was introduced in the archonship of Euclides.[1] More recently the date has been pushed back into the fifth century because of the mention of arbitration by Andocides[2]: *τὰς μὲν δίκας ὦ ἄνδρες καὶ τὰς διαίτας ἐποιήσατε κυρίας εἶναι, ὁπόσαι ἐν δημοκρατουμένῃ τῇ πόλει ἐγένοντο.* It is assumed that both public and private arbitral awards were reaffirmed by this enactment. But why should the awards of public arbitrators be reaffirmed? They were not final; the defeated party had the right of appeal. If he failed to exercise this right it was because he acquiesced in the decision. Accordingly there was no reason for expecting that there would be any general disposition to reopen cases settled by public arbitration. But private arbitrations were final; appeals were not allowed. Naturally the defeated party would welcome an opportunity for reopening the case. Thus the Andocides passage furnishes no proof of the existence of public arbitration before the archonship of Euclides. Furthermore, it is entirely improbable that arbitration was introduced under the democratic régime of the fifth century, though it was never more needed, for it would have materially lessened the amount of litigation and relieved the congestion of the courts. But one may very well doubt whether the ecclesia would have passed a measure that tended to lessen the activities of the popular courts even if a reformer was bold enough to propose it.[3] The popular jealousy of any interference with the courts is seen in the success of Themistocles' charge that Aristides by his activity as a private arbitrator was subverting the popular courts as a step toward tyranny.[4]

The earliest certain references to public arbitration are subsequent to the Peloponnesian War. A law dealing with arbitration

[1] Pischinger, *De Arbitris Atheniensium Publicis* (1893), pp. 45 ff.; cf. Lipsius, *op. cit.*, p. 220.

[2] i. 88. In reference to the view that this passage proves the existence of public arbitrators before the time of the Thirty, Caillemer (Daremburg and Saglio, *Dictionnaire des Antiquites*, *s.v.* "Diaitêtai") inquires: "Mais l'argument tiré de ce texte est-il bien probant?"

[3] It is worth noting that Aristophanes, who has much to say about litigation, makes no mention of arbitration.

[4] *τῷ δ' οὖν Ἀριστείδῃ συνέβη τὸ πρῶτον ἀγαπωμένῳ διὰ τὴν ἐπωνυμίαν ὕστερον φθονεῖσθαι, μάλιστα μὲν τοῦ Θεμιστοκλέους λόγον εἰς τοὺς πολλοὺς ἐμβαλόντος, ὡς Ἀριστείδης ἀνηρηκὼς τὰ δικαστήρια τῷ κρίνειν ἅπαντα καὶ δικάζειν λέληθε μοναρχίαν ἀδορυφόρητον ἑαυτῷ κατεσκευασμένος* (Plutarch *Aristides* vii).

is mentioned in a fragment of Lysias. In a suit to recover a sum of money (*περὶ τοῦ χρέως*) the defendant claims that he exhausted every means to effect a settlement without litigation, but in vain. The plaintiff constantly refused either to effect a friendly settlement or *δίαιταν ἐπιτρέψαι, ἕως ὑμεῖς τὸν νόμον τὸν περὶ τῶν διαιτητῶν ἔθεσθε.*[1] Schoemann,[2] contrary to the generally accepted view, argued that this law did not establish arbitration but merely extended its scope by increasing the amount that could be referred to arbitration. But why should the law have placed an upward limit on claims subject to arbitration? Amounts up to ten drachmas were exempt, not because it was not deemed desirable to have such claims settled by arbitration, but to prevent them from finding their way into court on appeal.[3] But no consideration could justify the exemption of a case from arbitration on account of the largeness of the sum involved. Indeed, the larger the amount in dispute the more desirable it was to afford an opportunity for a compromise. There is even less reason for the view that this law was an amendment to the original law, extending it so as to include the kind of claim in question. The claim was for a sum of money (*περὶ χρέως*) and was based on a *συμβόλαιον*. This is precisely the kind of case that would lend itself most readily to arbitration. It is inconceivable that even a limited measure of public arbitration exempted a dispute regarding a debt. Unquestionably the reference is to the law that established arbitration. The speech cannot be dated, but it is not earlier than the archonship of Euclides.

A technical phrase (*μὴ οὔσας διώκειν*) always used of appeals from an arbitrator's award occurs in Lysias' speech against Diogeiton[4] delivered in 401 or 400. The arbitration law, then, was part of the legislation enacted by the restored democracy between 403 and 400. At this time the Forty were organized in place of the Thirty: *οἱ καλούμενοι κατὰ δήμους*. Owing to the intimate relations between the Forty and the arbitrators it is more than likely that the two boards were instituted at the same time, if not by the same law.

[1] Lysias, frg. XIX (Thalheim).

[2] *Die Verfassungsgeschichte Athens*, pp. 44 ff.

[3] Doubtless in these cases the Forty attempted to induce the parties to reach an agreement, thus in practice giving them the benefits of arbitration.

[4] Lysias xxxii. 2.

This relationship was not accidental. The Thirty as originally constituted by Pisistratus were primarily arbitrators. For while they were empowered to give binding decisions on the merits of the cases, their chief function was to induce the disputants to reach a compromise: *διὸ καὶ τοὺς κατὰ δήμους κατεσκεύασε δικαστὰς καὶ αὐτὸς ἐξῄει πολλάκις εἰς τὴν χώραν ἐπισκοπῶν καὶ διαλύων τοὺς διαφερομένους.*[1]

The implication is that Pisistratus *διαλύων τοὺς διαφερομένους* did precisely what the Thirty did. Regarding the functions of the Thirty rural justices instituted in 453 no information is available, but it may be safely assumed that they were essentially the same as those of the itinerant judges of Pisistratus.[2] When the board was reorganized under the restored democracy and increased to Forty, its duties were fundamentally changed. The arbitral functions of the original board were assigned to the arbitrators, a board instituted for this purpose. Hence the close connection between them and the Forty.[3]

Written evidence came into general use about 390, more than a decade after arbitration. But there is no objection to assuming that *ὁ τῶν διαιτητῶν νόμος*[4] contained a provision requiring affidavits for all arbitration cases. The words *καὶ ἀνάβητε τούτων μάρτυρες* in the earliest case involving arbitration do not necessarily imply oral evidence, as expressions of similar import are found in speeches delivered long after all evidence was required to be reduced to writing.[5] The other alternative is to assume a thorough revision of *τὸν τῶν*

[1] Aristotle *Constitution of Athens* 16. 4.

[2] *Ibid.* 26. 3; 53. 1.

[3] In a paper entitled, "The Jurisdiction of Athenian Arbitrators," *Class. Phil.*, II (1907), 407 ff., I pointed out that, so far as citizens were concerned, only the cases that came under the jurisdiction of the Forty were subject to arbitration. Consequently neither the archon nor the thesmothetae sent cases to the arbitrators. Lipsius, *Das attische Recht* (1905), p. 228, reached the conclusion that the only cases involving property rights that were exempt from arbitration were the monthly suits (*ἔμμηνοι δίκαι*) which came within the jurisdiction of the *εἰσαγωγεῖς*. In *Nachträge und Berichtigungen* (1915), p. 981, he accepts my view so far as concerns the *διαδικασίαι κλήρου*, which are much the most important cases that came before the archon. The considerations drawn from the evolution of the Forty from the Thirty rural judges afford additional confirmation of my theory.

[4] Demosthenes xxi. 94. This comprehensive piece of legislation dealt with private as well as public arbitration (Lipsius, *op. cit.*, p. 221).

[5] Lysias xxxii. 18; cf. Demosthenes xliv. 14: *καί μοι κάλει τοὺς μάρτυρας δευρί.*

διαιτητῶν νόμον in 390. The former alternative is to be preferred. In either case it is clear that the purpose in introducing written evidence was to facilitate appeals from the awards of arbitrators.

The extension of the practice to cases not subject to arbitration need occasion no difficulty.[1] Testimonial evidence was not of paramount importance in an Athenian trial. The facts of the case were developed by the speakers with or without corroboration of the details. Corroboration was always desirable but never essential. In modern practice the facts in the case must be presented entirely through the medium of evidence. Thus the disadvantages resulting from the presentation of evidence in an inferior form were outweighed by the accruing advantages, among which uniformity in practice, saving of time, and greater certainty in dealing with perjury are obvious.

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[1] The words ἐνθυμεῖσθ' ὅτι διὰ ταῦθ' ὁ νόμος μαρτυρεῖν ἐν γραμματείῳ κελεύει (Demosthenes xlv. 44) suggest that the practice was extended by law.